Supreme Court, U.S.
FILED
JUN 7 2002
CLERK

(2)

No. 01-1626

In the

Supreme Court of the United States

RAFIDAIN BANK,

Petitioner,

v.

FIRST CITY, TEXAS-HOUSTON, N.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

J.P. Morgan Chase Bank, successor to the interest of First City, Texas-Houston, N.A. in this litigation, pursuant to Supreme Court Rule 29.6, states that its parent corporation is J.P. Morgan Chase & Company. Its recent former parents were Chase Manhattan Corporation, and Chemical Banking Corporation. All three of these entities have issued shares to the public.

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STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit accurately summarized the facts pertaining to the appeal. (Pet. Appendix A - App. 3a-8a.[1]) In light of Petitioner's Statement of the Case, however, First City, Texas-Houston, N.A. ("First City") submits this statement to clarify the facts relevant to this petition.

The Underlying Lawsuit

In 1990, First City sued Rafidain Bank ("Rafidain") for default on Rafidain's loan obligations to First City. (App. 3a.) The lawsuit followed Iraq's repudiation of its foreign debts after its invasion of Kuwait. (App. 43a.) First City also sued the Central Bank of Iraq ("Central Bank") as the alter ego of Rafidain. (App. 3a.) In 1991, First City obtained a $53.2 million default judgment against both banks, but the judgment against the Central Bank was later vacated for insufficient personal service. (*Id.*)[2] After re-serving the Central Bank, First City sought to establish its alter ego claim to enforce its judgment against Rafidain and collect from both Rafidain and the Central Bank. (*Id.*) Accordingly, First City served discovery requests on both Rafidain and the Central Bank. (*Id.*)

The Prior Proceedings

The first appeal in this case was from the District Court's 1997 dismissal of the Central Bank on the

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[1] Petitioner's Appendix shall be cited herein as "App. __a."

[2] The Default Judgment dated April 22, 1991, is contained in Petitioner's Appendix as Appendix H, App. 67a-68a.

grounds of sovereign immunity. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998). (App. 42a-55a.) In reversing that dismissal, the Second Circuit held that First City should have been allowed discovery into its claim that the Central Bank was the alter ego of Rafidain. (150 F.3d at 177; App. 52a.) The Circuit Court held that further discovery on Rafidain would not intrude upon sovereign immunity because Rafidain, "has been found to fit within the FSIA's 'commercial activity' exception and because First City has a judgment against Rafidain." (150 F.3d at 177; App. 52a.) The Circuit Court instructed the District Court to permit First City to conduct full discovery against Rafidain. (*Id.*)

Shortly thereafter, First City served a subpoena upon Rafidain by serving Iraq's Permanent Representative to the United Nations in New York, Rafidain's designated agent, as permitted by the loan documents and federal rules, and mailing a copy to Rafidain's counsel of record. (App. 31a-32a.) This is the subpoena referred to as the "1998 Subpoena." (Pet. Lodging at L-4.) When Rafidain refused to comply with the subpoena, First City moved to hold it in contempt. On November 19, 1998, the District Court entered an Order to Show Cause against Rafidain, and one year later, on November 1, 1999 held Rafidain in civil contempt. (App. 36a-41a.)

On June 21, 2000, seven and a half months after the Contempt Order, Rafidain moved to vacate the Order on the grounds that the District Court lacked subject matter jurisdiction and personal jurisdiction. (App. 6a.) First City served additional post-judgment discovery on Rafidain's new lawyer pursuant to Federal Rule 69. (*Id.*) Rafidain's motion to quash this discovery was denied, as was its motion for a stay, and Rafidain withdrew its appeal from that ruling in its opening brief in the appel-

late court. (*Id.*) On November 8, 2000, the District Court denied Rafidain's motion to vacate the Contempt Order. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 255 (S.D. N.Y. 2000). (App. 23a-35a.) On February 7, 2002, the Second Circuit affirmed the District Court's decision, and it is that ruling that is the subject of the Petition. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002). (App. 1a-15a.)

The Second Circuit Decision

The Second Circuit expressly did not decide whether Rafidain was a "party" to the lawsuit when the subpoena was issued, stating, "[w]e affirm, without deciding whether Rafidain is or has been a 'party,' on the ground that because jurisdiction under the FSIA existed to decide the underlying litigation involving a loan agreement and letters of credit, the FSIA continues to confer jurisdiction for proceedings in aid of that money judgment." (281 F.3d at 49; App. 2a.) The Circuit Court held that Rafidain had submitted itself to the jurisdiction of the United States courts by virtue of its commercial banking transactions in the United States. (281 F.3d at 53; App. 11a.) Rafidain does not contest this finding. (*Id.*)

The Circuit Court also held that the waiver of sovereign immunity under the "commercial activities" exception, "is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." (281 F.3d at 53-54; App. 12a.) And, the Court held that where subject matter jurisdiction exists under the FSIA, "jurisdiction continues long enough to allow proceedings in aid of a money judgment that is rendered in the case." (*Id.*) The affirmance

on this point was bolstered by the Second Circuit's factual finding that the 1998 Subpoena "does seek production of evidence calculated to aid First City's collection on the money judgment entered against Rafidain." (281 F.3d at 54, n.3; App. 12a, n.3, citing the 1998 Subpoena, App. L-4.)

Thus, to challenge the Second Circuit's decision on subject matter jurisdiction, Petitioner must either challenge the legal proposition that jurisdiction over a sovereign for purposes of a lawsuit encompasses post-judgment discovery, or the finding that the subpoena was in aid of collecting a money judgment. Neither of these issues is raised by Petitioner's "Questions Presented."

The Second Circuit also affirmed the District Court's finding of personal jurisdiction over Rafidain, based on (a) Rafidain's waiver of any objection to the manner of service; (b) Rafidain's acknowledgment that it had actual notice of the 1998 Subpoena; and (c) a fact finding that First City effected service of the subpoena on Rafidain (by serving the Permanent Representative of Iraq to the United Nations at the Iraq Mission) in accordance with the contractual arrangement for service contained in the loan agreement between First City and Rafidain. (281 F.3d at 54-55; App. 14a-15a.) Rafidain does not contest the first two of these bases. Instead, it tries to argue against the fact finding in the third, urging that the service was inconsistent with the parties' contract.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Second Circuit affirmed the District Court on the ground that the court's jurisdiction extended to proceedings in aid of a money judgment. The Circuit Court expressly did not decide whether Petitioner remained a "party" to the lawsuit or whether the FSIA would allow discovery against a non-party. Accordingly, none of the three questions upon which Petitioner seeks review is properly raised by this case. Petitioner does not contend that the Circuit Court decision is in conflict with the decision of any other circuit or of any state court of last resort. The only issue that Petitioner contends is an important question of first impression, relating to discovery from non-party foreign states, was not even decided by the Second Circuit. Thus, there is no compelling reason why the Petition should be granted.

Petitioner is really seeking an additional appellate review of the two issues decided by the courts below: (1) whether the subpoena was "in aid of a money judgment;" and (2) whether service of the subpoena on Rafidain was in accordance with the contractual arrangements for service in the loan agreement. These are not the kind of fact findings this Court should review.

I. The Undisputed Subject Matter Jurisdiction Over Rafidain Extends To Matters In Aid Of Enforcement Of A Monetary Judgment.

The first two questions presented by Petitioner concern subject matter jurisdiction. Petitioner contends that the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602-1611, does not "create an exception" to immunity for non-party discovery against a foreign state. Petitioner further con-

tends that 28 U.S.C. § 1330(a) does not confer subject matter jurisdiction on a foreign state where "the foreign state or agency is not a party to the action." (Pet. at i.) However, these questions ignore the basis upon which the Second Circuit affirmed the Contempt Order. That Order was affirmed because the District Court's subject matter jurisdiction over First City's claims against Rafidain was undisputed, and because such jurisdiction extends to matters in aid of enforcement of the money judgment against Rafidain.

It is uncontested that the District Court had subject matter jurisdiction over First City's claims against Rafidain. While foreign states and their agencies generally enjoy sovereign immunity pursuant to 28 U.S.C. § 1604, there is an exception for "commercial activities" by such entities. 28 U.S.C. § 1605 provides that:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States *in any case*—
>
> * * *
>
> (2) in which *the action* is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . . .

(Emphasis added.) Rafidain does not dispute that it participated in commercial banking transactions in the United States, or that the First City action was based on such transactions, specifically the parties' loan agreements. (App. 11a.) *See, Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (subject matter jurisdiction over Argentine central bank's issuance of bonds and rescheduling of bond payments). Here, there is clearly a

"case" against Rafidain, and "the action" is based on Rafidain's commercial activity.

The Second Circuit did not address, and this Court need not consider, whether Rafidain was still a "party" to the lawsuit when the 1998 Subpoena was served. Although Petitioner seeks to frame the questions for review in terms of jurisdiction over a non-party, the Second Circuit correctly held that, "[T]he waiver by a foreign state under section 1605(a)(2) [quoted above], rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." (281 F.3d at 53-54; App. 12a.) *See*, *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" Quoting *Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768 (1868).

In the Second Circuit, Petitioner conceded that it was subject to the court's continuing jurisdiction in aid of enforcement of the judgment. In its brief on appeal, Petitioner stated, "[t]here is no dispute, of course, that Rafidain is a judgment debtor and, as such, is subject to the jurisdiction of the district court for purposes of asset discovery in aid of execution under Fed. R. Civ. P. 69(a)." (Rafidain Br. in 2nd Cir. at 4.) Thus, Petitioner admits that the court retains subject matter jurisdiction to enforce the judgment. Although Petitioner argues that the 1998 Subpoena was not in furtherance of post-judgment collection efforts, the appellate court expressly disagreed. It found, as a factual matter, that the 1998 Subpoena sought production of evidence "calculated to aid First

City's collection on the money judgment entered against Rafidain." (281 F.3d at 54 and n.3; App. 12a.) "In this case," the Second Circuit stated, "that includes discovery regarding a possible alter ego of Rafidain that may have assets sufficient to satisfy First City's judgment." (App. 12a; and similar statement at 9a.) This Court should not reverse the lower court's fact finding.[3]

II. The Lower Courts' Fact Determinations On Service And Personal Jurisdiction Should Not Be Disturbed.

Petitioner raises the issue of personal jurisdiction, arguing that there could be no contempt if the District Court did not have personal jurisdiction over Rafidain at the time it entered the Contempt Order. The court's personal jurisdiction over Rafidain stemmed both from the original personal jurisdiction for the case, extended to enforcement proceedings as discussed above, and from service of the 1998 Subpoena on Rafidain.

There is no dispute regarding service of the initial summons and complaint. Rafidain's motion to vacate the 1991 default judgment was denied, and Rafidain did not appeal that order. (Pet. at 5; *First City, Texas-Houston, N.A. v. Rafidain Bank*, *supra*, 197 F.R.D. at 252; App. 25a.) 28 U.S.C. § 1330(b) specifically states that, "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [subject matter juris-

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[3] As the Second Circuit noted, Petitioner's complaint is really with the discretion exercised by the District Court as to what discovery to allow, not with subject matter jurisdiction. (281 F.3d at 54; App. 12a.)

diction] where service has been made under section 1608 of this title [by special arrangement]." See, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989). Thus, the court had personal jurisdiction over Rafidain in this case beginning in 1990. (App. 67a-68a.)

Both the District Court and the Court of Appeals found that service of the 1998 Subpoena was sufficient to confer personal jurisdiction over Rafidain. The Second Circuit affirmed personal jurisdiction over Rafidain on each of the three independent bases decided by the District Court. The Circuit Court held that Rafidain waived any objection to the manner of service of the subpoena, "because it does not claim lack of actual notice, yet it failed to appear or challenge the contempt order or service of the subpoena until more than eleven months after the contempt order was entered and twenty-one months after the subpoena had been served." (281 F.3d at 55; App. 14a.) The District Court refused to vacate the Contempt Order on this same basis. (197 F.R.D. at 254; App. 30a.) In framing its final question presented, Petitioner concedes that it "received actual notice of the subpoena." (Pet. Questions Presented, Pet. at i.)

Personal jurisdiction is a defense that can be waived. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-704 (1982) (personal jurisdiction can be waived); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (jurisdiction defense "may be lost by failure to assert it seasonably"). Here, Petitioner concedes actual notice of the subpoena, but did nothing to challenge personal service for more than a year and a half. Petitioner's belated attempt to object to service did not come until it sought to vacate the Contempt Order, almost a year after that

order was entered. The District Court held that Petitioner had waived that objection. This Court should not disturb that finding.

The Second Circuit also affirmed because, aside from waiver and actual notice, the service of the 1998 Subpoena complied with the "special arrangement for service" contained in the loan documents. (281 F.3d at 55; App. 14a-15a.) The District Court examined the actual means of service of the 1998 Subpoena and made a factual determination that such service complied with the provisions of the loan agreement between First City and Rafidain. (197 F.R.D. at 255; App. 31a-32a.) The loan agreement appointed the Iraqi Permanent Representative in New York as its agent to accept service. (*Id.*) First City served that agent by delivering a copy of the subpoena to the Iraqi Mission and mailing a copy to Rafidain's counsel. (197 F.R.D. at 255; App. 32a.) The District Court held that this satisfied the requirements of both the Federal Rules of Civil Procedure and the loan agreement—the special arrangement for service agreed to by the parties. The Second Circuit affirmed that holding. This Court should not grant certiorari to review the factual determination of whether the service of a subpoena comported with a contractual agreement for service.

CONCLUSION

This Court should not grant certiorari here because there is no compelling reason to do so. There is no conflict between the Circuits, or any other courts, on any of the issues raised by Petitioner. None of the questions presented by Petitioner were even decided by the appellate court, and resolution of those issues would not change the outcome of this case. There is no important question of first impression.

The Petition should be denied.

Respectfully submitted,

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